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No. 99-687

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,

Petitioners,

v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in concluding that the question of the constitutionally permissible maximum punitive damages award is a matter of law reviewed *de novo* on appeal.

2. Whether a punitive damages award must be deemed constitutional simply because it bears approximately a one-to-one ratio with the corresponding compensatory damages award.

3. Whether the Third Circuit, having decided that a punitive damages award exceeded the constitutional maximum, erred when (without even an adequate objection from petitioners) it ordered the award reduced to the constitutional maximum, without the option of petitioners' electing a new trial.

RULE 29.6 STATEMENT

The parent corporation of respondent EBI Medical Systems is Biomet, Inc., and the parent corporation of respondent Electro-Biology, Inc., is Biomet, Inc. Respondent Biomet, Inc., has no parent corporation. No publicly held company (other than Biomet, Inc.) owns 10% or more of the stock of any of the respondents.

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (Pet. App. 64a-107a) is reported at 975 F. Supp. 681. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-63a) is reported at 181 F.3d 446.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1999. Petitions for rehearing were denied on July 23, 1999. Pet. App. 109a, 111a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners assert that their petition involves the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, and the Seventh Amendment to the U.S. Constitution, which are reproduced at Pet. App. 112a.

STATEMENT

A. The Relationship Between EBI and Orthofix

Petitioners Orthofix S.r.l., Inter Medical Supplies Ltd., and Orthofix Inc. are, respectively, an Italian manufacturer of medical devices, a Cyprus-based distributor of Orthofix S.r.l.'s devices, and a Texas-based distributor of Orthofix S.r.l.'s devices in the United States. Pet. App. 3a. Petitioners will be referred to collectively as "Orthofix." Orthofix's medical devices include external bone fixators, which are orthopedic devices that hold fractured bones in alignment from outside the skin. Respondents are Biomet, Inc., an Indiana-based manufacturer of orthopedic devices, and its subsidiaries Electro-Biology, Inc., and EBI Medical Systems, Inc., the latter of which is a New Jersey-based seller of a number of orthopedic devices, including bone fixators. Pet. App. 3a. Respondents will be referred to collectively as "EBI."

From 1983 through May 31, 1995, pursuant to a series of distributor agreements, EBI served as the exclusive North American distributor of Orthofix external bone fixators and related products. Pet. App. 3a. During that 12-year period, EBI built sales of Orthofix fixators in the United States from zero to approximately $30 million per year. Pet. App. 3a-4a. About a year before the distributor agreement was to expire, however, it became clear that Orthofix was not interested in renewing the agreement, at least without a fundamental change in the agreement's pricing structure. C.A. App. 428-39, 864-65, 988-90. EBI informed Orthofix that if it maintained its

position, EBI would have no choice but to allow the agreement to expire and then enter the market itself as a competitor to Orthofix. C.A. App. 864-72.

Recognizing the likely termination of the distributor agreement, the parties began to make plans. Orthofix announced on May 8, 1995—*before* the agreement expired—that it had acquired American Medical Electronics ("AME") to serve as its new distributor. AME later became Orthofix, Inc. C.A. App. 446, 463-67.

EBI, for its part, carefully considered its obligations under the distributor agreement before deciding how to proceed. Desiring to develop a new fixator to be sold only after the agreement expired (C.A. App. 873-75), EBI consulted several lawyers on the question, including experts on Italian law, since the agreement provided that "[t]his Agreement shall be governed by the laws of the Republic of Italy." C.A. App. 210. EBI was assured that the agreement did not prohibit it from developing a new product during the agreement's term, provided no sales took place until after the agreement expired. C.A. App. 994-96.

Accordingly, during the fall of 1994, EBI began to develop a new fixator. At the same time, EBI increased its purchases of Orthofix fixators so it would have sufficient inventory to supply its customers until its new fixator became available for sale. C.A. App. 994. Orthofix, however, did not make things easy for EBI. Although EBI had sufficient inventory of some Orthofix components, its inventory of certain parts was extremely low. C.A. App. 653-54, 876-77. EBI thus submitted additional orders for these parts, but for the first time in their 12-year relationship, Orthofix began ignoring EBI's purchase orders. On one occasion, for example, EBI placed an order for $630,000 worth of goods that it never received. It turned out that Orthofix sent the goods from Italy,

but when they reached port in New York, Orthofix instructed the shipping company to redirect the delivery, first to AME in Texas and then back to Europe. C.A. App. 495-96, 832-42. Orthofix failed to supply EBI not only with fixators, but with critical parts—including clamps, screws, bushings, and cams—that are essential to a properly functioning fixation system. C.A. App. 653-54, 939-41. In all, between late 1994 and May 31, 1995, when the distributor agreement expired, Orthofix failed to fill $5.5 million in purchase orders. C.A. App. 978.

As it had planned, EBI began selling its new fixator a few months after the distributor agreement formally expired. And EBI was spectacularly successful in the marketplace. It was able to sell its new fixator to the vast majority of the parties who had previously purchased Orthofix fixators. C.A. App. 221, 929-30, 933-35.

B. The District Court Action

Orthofix filed suit against EBI in November 1995, asserting numerous theories of liability, including breach of contract, unfair competition, trademark infringement, and tortious interference with prospective economic advantage. Orthofix's central allegation was that EBI had acted improperly by developing a new fixator while the distributor agreement remained in force, even though EBI had no intention of selling—and did not sell—the new fixator until after the agreement expired. This allegation was at the heart of Orthofix's liability and damages claims.[1]

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[1] Orthofix's damages theory was based on a supposed "EBI gap," a period of about ten months during which, Orthofix argued, it should have been able to operate without competition from EBI. C.A. App. 727-28. Orthofix's argument was that if EBI had waited until the distributor agreement expired on May 31, 1995, to begin to

Orthofix's claim was based on a provision in the distributor agreement—labeled by the parties as the "handle" clause—which provided that EBI could not "distribute, sell, promote the sale of, *or in any way handle*" any competing fixator during the agreement's term. C.A. App. 205 (emphasis added). It would have been a simple matter for Orthofix to provide in the agreement that EBI could not "develop" a fixator of its own, yet it did not. Further, Orthofix conceded that nothing in the agreement barred EBI from *arranging*, during the agreement's term, to sell another company's competing fixator once the agreement expired. C.A. App. 397. Nevertheless, Orthofix contended that the prohibition against *handling* a competing fixator in fact prohibited EBI from *developing* a new fixator while the agreement was in force.

Orthofix's argument prevailed. Following a hearing on the first day of trial, the district court held that the distributor agreement unambiguously prohibited EBI from developing a competing product during the term of the agreement. C.A. App. Br. Add. 6-11. The court based its ruling entirely on "the dictionary definition and standard English usage" of the word "handle." C.A. App. Br. Add. 9. In addition, the district court concluded that the result would be the same even if the contract was ambiguous. C.A. App. Br. Add. 11-14. Accordingly, the district court instructed the jury that the "handle" clause

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develop its new fixator, it would have taken EBI at least a year—until June 1996—to bring its new fixator to market. Adjusting for two months of remaining inventory, Orthofix claimed it was entitled to a ten-month "EBI gap" during which EBI would have been unable to sell anything. C.A. App. 727-28. Accordingly, while Orthofix argued that its various tort claims "independently" supported the damages awarded by the jury, its damages theory was premised on the idea that EBI's early development of its new fixator was in breach of the distributor agreement.

prohibited "development" (C.A. App. 1129), essentially directing a verdict for Orthofix on the claim that EBI had breached the distributor agreement through its pre-termination efforts to prepare for its post-termination independence.

The jury returned a verdict for Orthofix on all theories of liability and awarded $48,875,397 in compensatory damages plus $100,600,000 in punitive damages. C.A. App. 47-48. The verdict was not entirely one-sided, though, at least regarding the issues of liability. The jury found in EBI's favor on its counterclaims that Orthofix itself had committed breach of contract, tortious interference with prospective economic advantage, and tortious interference with contract. But the jury awarded EBI only $2 in damages on those counterclaims.

The district court subsequently denied EBI's motion for judgment as a matter of law or a new trial. The court, however, ordered a remittitur reducing the punitive damages award to $50 million. C.A. App. Br. Add. 29. At the close of the evidence in the case, in fact, the district court had observed: "My personal view is, and I'm happy to state it for the record, if I was the fact finder, I don't think there is enough evidence of punitive damages." C.A. App. 1113.

C. The Third Circuit Decision

The Third Circuit affirmed the district court's interpretation of the handle clause. Pet. App. 11a-17a. In particular, the court rejected the sales-oriented definitions of "handle" that EBI had proffered.[2] The court noted, instead, that

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[2] As the court recognized, one definition of "handle" in *Webster's Third New International Dictionary* (1961) is "to trade in: engage in the buying, selling, or distributing of," and a definition of "handle" found in the *Random House Dictionary of the English Language* (2d ed. 1987) is "to deal or trade in." Pet. App. 15a.

the dictionary also includes broader definitions of "handle," and decided that because "handle" was preceded by the phrase "in any way," a "broad interpretation of the term 'handle'" was suggested. Pet. App. 16a-17a.[3] Thus, the court concluded that "the Agreement prohibited EBI from researching and developing a competing product during the tenure of that contract." Pet. App. 17a.

The Third Circuit also affirmed the compensatory damages award. EBI had attacked the award on numerous bases, including that Orthofix's claims for *future* lost profits were the result of unvarnished speculation. Pet. App. 26a-29a.[4] The court observed that the $48 million compensatory damages

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[3] The court noted that Orthofix had pointed out that "handle" is also defined in *Webster's Third New International Dictionary* as meaning "2(b): to conduct oneself in relation to, assume an attitude"; "2(c)(1): manage, control direct"; and "2(e): deal with, act upon, dispose of, perform some function with regard to," and in the *Random House Dictionary of the English Language* as meaning "11. to manage, deal with, or be responsible for" and "13. to manage, direct, train, or control." Pet. App. 15a. The court relied on those definitions notwithstanding that they do not focus on the sales context of the distributor agreement at issue here.

[4] As noted above, Orthofix's damages claim was based on the argument that EBI's breach of the "handle" clause allowed EBI to sell a competing fixator earlier than it otherwise could have done. But Orthofix's damages were not confined to the sales it allegedly lost during the period when Orthofix claimed the right to be free from EBI's competition (the "EBI gap"), an estimated $4 million. Rather, Orthofix claimed that it would have captured in perpetuity all the sales that EBI had previously made. Thus, the bulk of the $95 million Orthofix sought in damages derived from sales it allegedly lost *after* the "EBI gap" had ended, when EBI had the uncontested right to market a competing fixator.

award "appears large." Pet. App. 27a. At the same time, however, the court noted that the standard of review was "abuse of discretion," that "precision" is not required in proving damages, and that EBI's arguments regarding the credibility of Orthofix's expert witness, and the reliability of that witness's assumptions, were made to the jury. Pet. App. 29a.

EBI made numerous attacks on the $50 million punitive damages award, arguing that the award should be "vacated or, at a minimum, remanded for a new trial." C.A. App. Br. 39. The Third Circuit rejected some of the arguments. Pet. App. 30a-31a (rejecting the argument that the award had to be reversed because the failure of the compensatory damages award to distinguish between tort damages, which could support a punitive award, and contract damages, which could not, meant that no ratio between compensatory damages and punitive damages could be determined), 32a-33a (rejecting EBI's argument that the punitive award resulted from improper "passion and prejudice"), 33a-34a (rejecting EBI's argument that Orthofix had not provided evidence regarding each defendant's financial condition, as required by New Jersey law).

The Third Circuit did conclude, however, as EBI had argued, that the $50 million punitive damages was constitutionally exorbitant under the Due Process Clause of the Fourteenth Amendment. Pet. App. 34a-41a. Initially, the Court discussed the three "guideposts" this Court identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), as relevant to the question whether a punitive damages award passes constitutional muster: (1) the reprehensibility of the conduct, which this Court called "'[p]erhaps the most important indicium of the reasonableness of a punitive damages award,'" Pet. App. 35a (quoting *BMW*, 517 U.S. at 575); (2) the "'ratio'"

of punitive damages "'to the actual harm inflicted on the plaintiff,'" Pet. App. 36a (quoting *BMW*, 517 U.S. at 580); and (3) "a comparison of the punitive damages and the potential civil or criminal penalties for comparable misconduct," Pet. App. 37a (citing *BMW*, 517 U.S. at 583).

Considering the first—and "most important"—guidepost, reprehensibility, the court noted that "the harm inflicted on Orthofix was economic, rather than physical, and hence 'less worthy of large punitive awards than torts inflicting injuries to health or safety.'" Pet. App. 38a (quoting *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 638 (10th Cir. 1996)). Further, the court noted that Orthofix was "not a financially weak or vulnerable target," that Orthofix had failed to protect itself contractually by providing for specific remedies in the event of a breach, and also that "Orthofix itself breached the distributor agreement, failed to fill and ship EBI's legitimate orders, and engaged in tortious acts." Pet. App. 39a. In addition, the court recognized aggravating factors, including that the jury found that EBI acted with either "actual malice" or "a wanton and willful disregard of persons who foreseeably might be harmed," that EBI's conduct "involved acts of deception and, at least, reckless disregard of the consequences to Orthofix," and that EBI's conduct "continued over an extended period of time with full awareness of the harm to Orthofix." Pet. App. 39a.

Recognizing all of these factors, pro and con, the court concluded that "EBI's conduct, which included only economic harm for which large compensatory damages have been awarded, was not sufficiently egregious to warrant a punitive damages award of $50 million. In this connection, we take into consideration that high, easily calculable compensatory damages may more appropriately be accompanied by a lower

punitive damages ratio." Pet. App. 39a (citing *BMW*, 517 U.S. at 582).[5]

The court then addressed the question of what the constitutional maximum was, under *BMW*, for the conduct involved in this case. The court, recognizing that no formula existed that would resolve the issue, ultimately reached the following conclusion:

> In the last analysis, an appellate panel, convinced that it must reduce an award of punitive damages, must rely on its combined experience and judgment. When different members reach different figures, they must seek an accommodation among their views, a process that recurs throughout appellate decision making. After reviewing the record and the arguments in this case, we conclude that the proper, reasonable punitive damages award is no more than $1 million.

Pet. App. 41a. In the balance of its opinion, the Third Circuit addressed the points Judge Garth made in his dissent.

REASONS FOR DENYING THE PETITION

The intercircuit conflicts that petitioners claim to exist do not, and the decision below is correct. Moreover, one of the questions was not properly preserved below. None of the issues warrants review by this Court.

Regarding the first question presented, the courts of appeal are not in conflict over the distinction properly reflected in the Third Circuit's ruling in this case. The determination of

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[5] The court also specifically discussed the third guidepost, "reference to the sanctions for comparable misconduct," but concluded that in this case the comparison was "unhelpful." Pet. App. 39a.

the constitutionally permissible maximum level for a punitive damages award, like other legal determinations, is reviewed *de novo*. In contrast, the determination that the amount awarded was excessive, being an exercise by the trial court of its traditional common-law power to order a new trial where the verdict rendered is against the weight of the evidence, is reviewed for abuse of discretion.

The second question presented, relating to the proper ratio between the compensatory damages award and the punitive damages award, is nothing but a disagreement with the particular determination of a highly context-specific issue in this case, presenting no issue that warrants this Court's review. This Court has previously decided that no bright-line test can or should be established to resolve this question. There is no need to revisit that conclusion in this case.

Finally, review is not warranted of the third question presented, concerning the form of "relief" following an appellate court's determination of the constitutional maximum. Petitioners did not adequately preserve their current contention in the court below, which therefore did not specifically discuss it. In any event, as with the standard of appellate review addressed in the first question, the courts of appeals are not in conflict over the form of relief (as to which the Third Circuit's judgment is correct). Whereas a common-law excessiveness weight-of-the-evidence decision may permit only a new trial, a punitive damages award may properly be reduced, by court order, to its maximum legal level.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners are wrong in alleging a conflict among the circuits regarding the standard of appellate review (not the substantive constitutional standard, also often labeled the "standard of review") that should be applied in assessing the

constitutionality of a punitive damages award. In particular, the Third Circuit decision in this case, which addressed the issue of what the constitutionally permissible maximum award was on the facts presented, conflicts with none of the court of appeals decisions petitioners cite. Petitioners' contrary allegation rests on a conflating of legal issues that are distinct and a mischaracterization of the Third Circuit's decision here. Correcting petitioners' confusion shows that the alleged conflict is illusory and, indeed, that the Third Circuit's decision is correct.

A. Two of the decisions alleged to be in conflict with the decision reached by the Third Circuit here—*Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), and *Pavon v. Swift Transportation Co.*, 192 F.3d 902 (9th Cir. 1999)—involved a review of the traditional excessiveness/unreasonableness determination made under Fed. R. Civ. P. 59(a), relating solely to whether a new trial should be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Neither decision involved a determination of the maximum legal (here, constitutional) level of an award, as the Third Circuit made in this case.[6] It is not disputed here that, where a court of appeals is reviewing a

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[6] Several procedural vehicles may be available in a district court for a request to reduce punitive damages on grounds of constitutional exorbitance. In *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252), the court pointed to Fed. R. Civ. P. 50, governing motions for judgment as a matter of law. 170 F.3d at 1331. An alternative is Fed. R. Civ. P. 59(e), addressing motions to alter or amend a judgment. *See, e.g., Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1331 (10th Cir. 1996) (holding that a district court's decision to vacate a punitive damages award was pursuant to Rule 59(e)).

district court's new-trial ruling under Rule 59(a) as to whether a punitive damages award is excessive, the standard of review is abuse of discretion. Where, however, the issue is constitutional exorbitance, as with other issues about legal limits, the standard of review is *de novo*.

In *Lee*, for example, the court stated that it was reviewing the punitive damages award involved there "for abuse of discretion," but in making that observation it relied directly on this Court's discussion of that standard in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434-36 (1996), which involved a Rule 59(a) new-trial motion. Indeed, the court in *Lee* noted not only the relevance, but the distinctness, of the constitutional standards of *BMW*. *See Lee*, 101 F.3d at 809 n.2. It is clear, moreover, that *Lee* in fact involved *only* a Rule 59(a) excessiveness motion, as the district court stated explicitly. *Lee v. Edwards*, 906 F. Supp. 94, 97-99 (D. Conn. 1995). Not surprisingly, then, the *Lee* court simply took for granted that the applicable standard of review was the one governing traditional Rule 59(a) excessiveness determinations.

The Ninth Circuit decision on which petitioners rely, *Pavon*, is no different. As petitioners' own excerpted quotation expressly indicates, *Pavon* involved a traditional determination, under Rule 59(a), whether the amount actually awarded was excessive and, for that reason, warranted a new trial. *See* Pet. 15 (quoting *Pavon*, which refers to "Rule 59"). The *Pavon* court did not address the legal issue of the constitutional maximum.

B. Undoubtedly, there is an overlap in reviewing a given punitive damages award for factual excessiveness or unreasonableness under the traditional common-law new-trial standards and determining what, on the evidence, a constitutional maximum would be. These reviews, however, are practically distinct: the former determines only that what

was actually awarded was against the weight of the evidence, without necessarily determining, as with the latter, a maximum permissible level. The issues are also legally distinct, as the district court in this case recognized in giving separate consideration to the issues. *Compare* Pet. App. 90a-92a *with* Pet. App. 97a-106a.

This distinction is implicitly recognized by petitioners themselves in their carefully worded characterization of *Gasperini* and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), as no more than "in tension" with the Third Circuit decision here. Pet. 17-18. *Gasperini* and *Browning-Ferris* both involved only Rule 59(a) excessiveness assessments. Indeed, petitioners recognize that *Browning-Ferris* involved "federal common law" review, pursuant to "Rule 59." *See* Pet. 17; *see also* Pet. 14-15. And *Gasperini* specifically contrasts the constitutional-maximum issue with the common-law excessiveness issue. 518 U.S. at 430 n.12. Indeed, the whole discussion in *Gasperini* of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which applies only when substantive state law is at issue, would have been pointless if the federal constitutional standards for punitive-damages awards had been the standards at issue.

C. Petitioners' additional basis for an alleged conflict is the Eleventh Circuit's decision in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252). As petitioners recognize, however, *Johansen* was explicit in holding that the constitutional-maximum determination is an issue of law reviewed *de novo*, thus directly supporting the Third Circuit's decision and undermining petitioners' contention. 170 F.3d at 1334. Moreover, *Johansen* is explicit in making the very distinction that petitioners blur. *Johansen* explains that the

common-law excessiveness/unreasonableness determination is (as Rule 59(a)'s text makes clear) an issue within the scope of the traditional authority of judges to grant new trials where the verdict is against the weight of the evidence and is subject to abuse-of-discretion review. 170 F.3d at 1328 & n.8, 1331, 1334. In contrast, *Johansen* recognizes, the constitutional-maximum determination "is a determination that the law does not permit the award" and is subject to the usual duty of appellate courts to determine legal issues *de novo*. 170 F.3d at 1331, 1334.

Because *Johansen's* main holding is directly contrary to petitioners' view, petitioners try instead to fasten onto *Johansen's* observation that factual findings made by the district court as part of its constitutional-maximum determination are subject to Rule 52(a) "clearly erroneous" review. Pet. 16 (quoting *Johansen*, 170 F.3d at 1335). But, in addition to the facts that *Johansen* itself calls for careful factor-by-factor scrutiny even under the Rule 52 standard (170 F.3d at 1335) and reduced an award despite specific jury findings of bad intent (*id.* at 1336), the difficulty with petitioners' effort to use *Johansen* affirmatively is that nothing in the Third Circuit's opinion repudiates the principle that facts found by the district court are subject to "clearly erroneous" review. To the contrary, the Third Circuit was careful not only to refer without disapproval to the "deference which we accord the trial court in such matters" (Pet. App. 43a), but to indicate that its ruling rested on its own overall assessment of what punitive award could be supported by the mix of relevant facts, including (without overturning) the "facts with respect to reprehensibility" found by the jury (Pet. App. 39a). Nothing in *Johansen* conflicts with that approach.

Indeed, the Third Circuit hardly had before it, so hardly had to disagree with, significant factual "findings" by the

district court favorable to petitioners. The district court's constitutional analysis says almost nothing about the facts (Pet. App. 90a-92a), and neither in that analysis nor in its non-constitutional analysis did the court make "findings" so much as recount what evidence was before the jury, from which the jury could have made certain findings (Pet. App. 97a-106a). Moreover, in its constitutional analysis, the district court said that evidence of respondents' bad faith or persistence was "not abundant" (though such evidence was not "totally absent") and the conduct at issue caused no serious physical or environmental hazard (one patient was "'inconvenienced'"). Pet. App. 91a. Indeed, in its non-constitutional excessiveness review, the court expressly noted that there was no evidence that respondents' conduct was likely to recur or that it presented any threat to public health. Pet. App. 102a. And the district court had previously stated on the record: "[I]f I was the fact finder, I don't think there is enough evidence of punitive damages." C.A. App. 1113.

There is, accordingly, no conflict on the issue of appellate standards of review for constitutional-maximum determinations.[7]

D. Nor is there other reason for review of the issue here. In particular, this issue was not "expressly reserved for future decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994)." Pet. 11. The *Oberg* footnote reserved either the question of the substantive constitutional standard or the

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[7] In *Continental Trend Resources, Inc. v. OXY USA Inc.*, 520 U.S. 1241 (1997), this Court denied certiorari on a petition that presented the issue of the "federal appellate court's *de novo* review of a punitive damage award" (for compliance with constitutional standards, *see Continental*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)).

question of how *non*-deferential an appellate court's review must be to satisfy the constitutional due-process requirement of meaningful appellate review of punitive damages awards. Petitioners' first question does not address the substantive constitutional standard, and what they seek is less, not more, vigorous appellate review. *Oberg* is irrelevant.

And, for the reasons already indicated, the Third Circuit was correct (and in accord with *Johansen*) in applying a *de novo* standard of appellate review when determining the constitutional maximum for any punitive damages award on the present facts. The decision properly treats this legal issue like other applications of constitutional standards to the facts. Neither *BMW* nor its predecessors suggests mere abuse-of-discretion review of the constitutional question, while, as noted, *Gasperini* and *Browning-Ferris* did not involve that question.

In a recent decision involving the closely related issue of Excessive Fines Clause review of punitive forfeitures, this Court all but summarily rejected the contention "that a district court's determination of excessiveness should be reviewed by an appellate court for abuse of discretion," concluding instead that, while factual findings "must be accepted unless clearly erroneous," the "question of whether a fine is constitutionally exorbitant calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). As with Excessive Fines review, the particular constitutional standard here—demanding some reasonable measure of predictability and uniformity as to the outer bounds of punitive damages, based on a range of relevant comparative legislative and judicial experience—would be especially ill-suited for highly deferential abuse-of-discretion review. *See id.*; *Ornelas*, 517

U.S. at 697. Indeed, for just such reasons, even under the traditional common-law new trial excessiveness standard, this Court has recognized that discretion can be abused by passing a limit that is a "question of law." *Gasperini*, 518 U.S. at 435.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

There is no merit to petitioners' contention that this Court should review the Third Circuit's conclusion that $1 million was the maximum punitive damages award that the Constitution permitted in this case. That conclusion was entirely based on the circumstances of the present case and is without general applicability.

A. Nothing in *BMW* supports petitioners' contention that a punitive damages award that bears approximately a one-to-one ratio to the compensatory award should, for that reason alone, be immune from constitutional challenge. In *BMW*, in fact, this Court refused to set a bright-line test regarding the permissible ratio between the punitive damages award and the compensatory award. 517 U.S. at 582 ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."). On the contrary, the Court called for a context-specific inquiry in *BMW*, requiring examination of a variety of factors bearing on appropriateness given the purposes of punitive damages.

Indeed, while petitioners grudgingly recognize that the Court in *BMW* "set forth two other guideposts" in addition to the punitive-compensatory "ratio" (*see* Pet. 23 n.14), there is no merit whatsoever to petitioners' assertion that the purpose of these "other" guideposts is merely to act as a check on punitive damages awards in cases where the ratio appears high (*see id.*). The Court made it clear in *BMW* that the ratio between the

punitive and compensatory awards is only one factor to be considered, and not even the most important factor. Rather, it is the first guidepost—the reprehensibility of the defendant's conduct—that the Court labeled as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575.

Here, the Third Circuit reasonably concluded that the purposes of punitive damages could not justify more than a $1 million award for what was, at bottom, a purely commercial dispute between sizable companies. The harm was "economic" only, not physical. Pet. App. 38a. Petitioners were not "a financially weak or vulnerable target." Pet. App. 39a. Petitioners could, indeed, have provided contractually for specific remedies in the event of a breach. Pet. App. 39a. Petitioners themselves "breached the distributor agreement [with respondents], failed to fill and ship [respondents'] legitimate orders, and engaged in tortious acts." Pet. App. 39a. And the "compensatory" award was already a "large" one, involving "easily calculable" damages. Pet. App. 39a.

B. There is no merit to petitioners' claim that "the combined award of $98 million" ($48 million in compensatory damages and $50 million in punitive damages) was necessary to remove "the profit EBI had obtained by 'securing for [itself] the market in bone fixators which had previously been Orthofix's.'" Pet. 25. The district court never made any finding of such profits.[8] Petitioners can fairly say no more than

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[8] Throughout their petition, petitioners attempt to color the facts with the incorrect assertion that EBI had profits of (or was unjustly enriched by) $98 million. Pet. i, 3, 4 & n.2, 5 n.3, 6, 8 n.5, 12, 20, 25. A particular egregious example is petitioners' statement that the district court "concluded that New Jersey's Punitive Damages Act limited the jury's consideration to EBI's actual unjust

that they "presented *evidence* that, by securing for themselves the market in bone fixators which had previously been Orthofix's, defendants profited by 'approximately 97 million dollars.'" Pet. App. 101a (emphasis added). But there is no reason to think that either the district court or the jury accepted this evidence, which had been provided by petitioners' damages expert, Mr. Hoffman. Indeed, the jury's verdict for $48 million in compensatory damages shows that the jury *rejected* Mr. Hoffman's testimony that petitioners had suffered "lost profits" damages of $95 million. C.A. App. 726. There is nothing to indicate that in this case there is any difference between petitioners' damages, which the jury found to be $48 million, and EBI's profits, concerning which no finding was ever made.

Thus, petitioners' claim that review by this Court is necessary because the Third Circuit's decision "illustrates the confusion" the lower courts have regarding the effect of a defendant's profits on the punitive damages calculus (Pet. 25) is without merit. Since there was never a finding that EBI profited by $98 million, it is hardly surprising that the Third Circuit "did not mention" that. Pet. 25. No issue as to the role of a defendant's profits is presented by the Third Circuit's decision.

C. In sum, the Third Circuit reduced the punitive damages award in this case to $1 million based on a thorough consideration of EBI's conduct. Nothing in the court's analysis—which was specific to the particular circumstances of

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enrichment of $98 million." Pet. 5 n.3. In actuality, the district court stated only that the jury was limited to considering the defendant's *actual* profits, rather than its *potential* profits. But neither then nor at any other time did the court ever attach a number to EBI's profits (or unjust enrichment). Pet. App. 92a & n.8.

this case—warrants review by this Court. In particular, there is no reason to establish, as petitioners would have this Court do, a rule that as long as the ratio between punitive damages and compensatory damages in a case is no more than approximately one to one, that one factor conclusively establishes that the punitive damages award satisfies the Constitution.

III. THE THIRD QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners briefly contend, as their last question presented, that this Court should review whether a new trial (subject to remittitur) is the only proper form of appellate relief after a determination of the maximum constitutionally permissible amount of punitive damages. But, as indicated by petitioners' placement of the issue and the absence of any discussion of this issue by the Third Circuit (or the dissent), petitioners did not adequately preserve this question below. And there is no justification for review of this question in any event.

A. The Court repeatedly has refused to review questions neither pressed nor passed on below. *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990). Not until the final footnote (on the final page) of their Petition for Rehearing En Banc in the Third Circuit did petitioners contend that accepting respondents' constitutional argument could result only in a new trial (subject to remittitur). Even then, all petitioners did was to state the issue in a single sentence, merely citing *Johansen* without argument or elaboration. Petition for Rehearing at 15 n.9. The issue was not one of the issues identified in the Statement of Counsel required by the

Third Circuit's rules for *en banc* rehearing. *See* Third Cir. L.R. 35.1.

Petitioners did not adequately raise the issue below. First, this kind of bare unelaborated footnote contention, without even an express statement of the issue, is inadequate even if respondents could have waited to raise the point until rehearing.[9] Second, rehearing was already too late. When respondents, as appellants, argued to the Third Circuit that the punitive damages award was unconstitutionally excessive, and should be vacated *or* remanded for a new trial, petitioners did not respond that, even if the award was unconstitutional, the only proper remedy was a new trial, rather than appellate reduction of the award. Because the issue of remedy was anything but unanticipated prior to the panel decision, petitioners' current objection was forfeited when it was not raised until rehearing. *See, e.g.*, *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below."); *Estate of Wilson v. Aiken Indus., Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935); *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366-67 (1932).

B. In any event, the issue does not warrant review. The Eleventh Circuit's *Johansen* decision is the only full discussion of this issue. *Johansen* explains clearly that the limitation of relief to a new trial (subject to remittitur) applies only to traditional common-law excessiveness determinations (whether for punitive or compensatory damages)—which was what was

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[9] *See, e.g.*, *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1424 (9th Cir. 1994) (deeming waived an issue raised solely by footnote).

involved in this Court's decision in *Hetzel v. Prince William County*, 523 U.S. 208 (1998). A determination that the maximum constitutionally permissible award is a certain amount, in contrast, is a determination of a legal limit that appellate courts have long been permitted to embody in an order directing entry of a corrected judgment. *Johansen*, 170 F.3d at 1330-33; *id.* at 1330 (discussing, in particular, *New York, Lake Erie & W.R.R. Co. v. Estill*, 147 U.S. 591 (1893)). That is what the Third Circuit properly did in this case, without objection from petitioners and without express discussion.

There is no intercircuit conflict on this issue, let alone one sufficiently well developed to warrant review of the Third Circuit's proper application of governing legal standards. The Second Circuit decision in *Lee*, as already noted, involved a traditional new-trial excessiveness determination and so did not present this issue at all. The Tenth Circuit in *Continental Trend Resources*, after making a constitutional determination, said no more than that a remand for a new trial (subject to remittitur) was the "preferable" course, at least in that case. 101 F.3d at 643. It did not hold that such a remedy was always required and did not undertake any analysis of the issue. In an appropriate case, the Tenth Circuit presumably will have occasion to consider the *Johansen* analysis and whether the preference is only that or whether it is actually a requirement—even in cases where it would be pointless.

This is such a case. As explained in *Johansen*, in many cases "[g]iving a plaintiff the option of a new trial rather than accepting the constitutional maximum for [its] case would be of no value." 170 F.3d at 1332 n.19. In contrast to the usual Rule 59(a) determination simply that the amount awarded is excessive, leaving open the question of what a permissible amount would be, this case involves a determination of a constitutional upper limit on the established facts. Only if the

plaintiff had new facts to present, and were properly permitted to present new facts omitted from the first trial, would there be any possibility of the plaintiff's obtaining a sustainable award higher than the already-determined constitutional maximum. Petitioners have not remotely suggested what additional facts they would be entitled to establish and would establish at a new trial. Consistent with their failure to preserve this issue below, petitioners' request for a new trial appears to be an afterthought, and far from the kind of issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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